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NO. 93-917

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALIMADAD JATOI,
Petitioner,

v.

WILLIAM C. MEIER,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL R. COOPER
MARSHAL W. DOOLEY

DOOLEY & RUCKER, P.C.

3300 Oak Lawn, Suite 602
Dallas, Texas 75219
(214) 443-0000
Counsel for Petitioner

37 pp

QUESTIONS PRESENTED

1. Whether the dismissal of an appeal from a bankruptcy court order by the district court five (5) days after Appellant's Brief was due without any prior notice, and when no notice of docketing of the appeal had been sent pursuant Rule 8007 of the Bankruptcy Rules, constitutes such an abuse of discretion as to be a fundamental denial of due process under the 14th Amendment of the United States Constitution.

2. Whether the entry of a money judgment subsequent to the dismissal of the bankruptcy, against a debtor in a bankruptcy proceeding and when no formal adversary proceeding or proceeding tantamount to an adversary proceeding had been filed against the debtor seeking a money judgment, constitutes the taking of a judgment without notice in violation of the 14th Amendment to the United States Constitution.

LIST OF PARTIES

The Petitioner, Alimadad Jatoi, was the Debtor and Appellant below. The Respondent, William C. Meier, was the Creditor and Appellee below.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALIMADAD JATOI,
Petitioner,

v.

WILLIAM C. MEIER,
Respondent.

Petitioner Alimadad Jatoi respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals which is unpublished is reprinted in the Appendix to this Petition.

The decision of the United States District Court for the Northern District of Texas (Judge John McBryde) has not been

reported. It is also reprinted in the Appendix to this Petition

JURISDICTION

The decision of the Court of Appeals was issued and filed on April 16, 1993. A Petition for Rehearing was filed and the Petition for Rehearing was denied on May 12, 1993 and entered on May 12, 1993.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Facts

Alimadad Jatoi ("Jatoi"), the Petitioner, was a debtor in the bankruptcy proceeding pending in the United States Bankruptcy Court for the Northern District of Texas. On August 30, 1989, Jatoi filed a Plan of Reorganization and Disclosure Statement in his Chapter 11 bankruptcy proceeding (Docket Entries No 221 and 222). William C. Meier ("Meier"), the Respondent herein, filed an Objection to the Confirmation of Jatoi's Plan of Reorganization (Docket No. 237; Rec. Vol. 1, p. 89). The basis of such objection as it

relates to this petition was that Jatoi had failed to include in his Plan of Reorganization $41,261 in attorneys' fees alleged to be owing him for work done for Jatoi prior to the filing of the bankruptcy petition as a class 20 unsecured claim.

A hearing was held on Meiers' objection on December 19, 1989, and the Bankruptcy Court sustained Meiers' objection (Rec. Vol. 4).

On January 3, 1990, an Agreed Order of Dismissal dismissing Jatoi's Chapter 11 bankruptcy proceeding was entered (Docket Entry No. 250; Rec. Vol. 2, p. 177, 181).

On December 16, 1991, the Bankruptcy Judge entered a Money Judgment against Jatoi for $41,261 in attorneys' fees alleged to have been incurred by Jatoi in favor of Meier prior to the filing of the bankruptcy petition (Rec. Vol. 1, p. 26).

At the time this Money Judgment was entered, there was neither (i) an adversary proceeding under Bankruptcy Rule 7001 filed or pending against Jatoi wherein Meier sought

affirmative relief against Jatoi in the form of a money judgment, or (ii) any proceeding which could be construed as an adversary proceeding under Bankruptcy Rule 3007 pursuant to which Meier was seeking the recovery of a money judgment against Jatoi.

On December 26, 1991, Jatoi filed his Notice of Appeal of the money judgment entered on December 16, 1991 against him (Rec. Vol. 1, p. 27). The appeal was docketed in the United States District Clerk's Office according to the Docket Sheet on July 7, 1992 (Front Page of Vol. 1 of Rec.). Pursuant to Bankruptcy Rule 8009(a)(1) the Appellant's brief would have been due on July 22, 1992. However, no notice of docketing the appeal as required by Bankruptcy Rule 8007(b) was ever prepared or sent to any counsel in the case, or to Jatoi by the Clerk. On July 27, 1992, without any prior notice or warning, the District Court dismissed Jatoi's appeal for failure to file appellant's brief within 15 days of docketing

the appeal (Tr. Vol. 1, p. 3) (Rec. Vol. 1, p. 4).

The District Court's Opinion and Judgment

The Appeal of the December 16, 1991 money judgment against Jatoi was docketed on July 7, 1992. On July 27, 1992, he District Court issued its Memorandum Opinion and Order (Tr. Vol. 1, p. 3) and Final Judgment of Dismissal (Rec. Vol. 1, p. 4) dismissing the appeal for failure to file appellant's brief within 15 days of the docketing of the appeal. In dismissing the appeal relied on the case of International Brotherhood of Teamsters v. Braniff Airways, Inc. (In Re: Braniff Airways, Inc., 774 F.2d 1303, 1305, 5th Cir. 1985).

The Opinion and Judgment of the Court of Appeals

The dismissal of Jatoi's appeal to the United States District Court from the Judgment of December 16, 1991 (Tr. Vol. 1, p. 3)(Rec. Vol. 4) was appealed to the United States Court of Appeals for the 5th Circuit. On April 16, 1993, the United States Court of

Appeals affirmed the dismissal of such appeal by the District Court relying on the case of International Brotherhood of Teamsters v. Braniff Airways, Inc. (In re: Braniff Airways, Inc., 774 F.2d 1303, 1305, 5th Cir. 1985).

Basis for Jurisdiction Below

The District Court had original jurisdiction over the matter pursuant to Rule 8001(a) of the Bankruptcy Rules inasmuch as the appeal to the District Court was from a Final Judgment of a Bankruptcy Judge. The Court of Appeals exercised its appellate jurisdiction as of right pursuant to 28 U.S.C. §1291 because the appeal was an appeal from a Final Order of a District Court of the United States.

REASONS FOR GRANTING THE WRIT

I. **THE UNITED STATES DISTRICT COURT AND THE COURT OF APPEALS IN AFFIRMING THE GRANTING OF A MONEY JUDGMENT SUBSEQUENT TO THE DISMISSAL OF THE BANKRUPTCY AGAINST A DEBTOR IN A BANKRUPTCY PROCEEDING WHEN NO FORMAL ADVERSARY PROCEEDING, OR PROCEEDING TANTAMOUNT TO AN ADVERSARY PROCEEDING, HAD BEEN FILED AGAINST THE DEBTOR SEEKING A MONEY JUDGMENT, CONSTITUTES THE TAKING OF A JUDGMENT WITHOUT NOTICE IN VIOLATION OF**

THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER AND SUPERVISION.

The issue complained about by Jatoi on appeal to the United States District Court and to the 5th Circuit Court of Appeals was that the Bankruptcy Judge had entered a Money Judgment against him in the amount of $41,261 for attorneys' fees allegedly incurred to his attorney prior to the filing of his bankruptcy. This Money Judgment was granted by the Bankruptcy Judge and entered subsequent to the dismissal of his bankruptcy. Prior to the dismissal of his bankruptcy and at the time that the judgment was entered, there had never been any formal adversary proceeding pursuant to Rule 7001 of the Bankruptcy Rules, or proceeding tantamount to an adversary proceeding pursuant to Rule 3007 of the Bankruptcy Rules filed or pending seeking a money judgment against him. Jatoi had no notice that Meier was seeking a money judgment

against him for his pre-petition attorneys' fees.

It is fundamental that due process requires notice in any proceeding with an opportunity to appear and be heard before a final judgment may be entered. A judgment entered without adequate notice to the parties is void and subject to collateral attack. Handley v. Four Corners Properties, Inc., 480 F.2d 536 (U.S.C.A. 10th Cir. 1973); Application of Kaufman, 136 F. Supp. 626 (U.S.D.C., New Jersey 1955); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983; 32 L. Ed. 2d 556 (1972); Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1964); Mullane v. Central Hantover Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

Prior to January 3, 1990, Jatoi was a debtor in a Chapter 11 bankruptcy proceeding. In that proceeding Jatoi filed a Plan of Reorganization (Docket Entry No. 221). Meier filed an Objection to the Confirmation of Jatoi's Plan of Reorganization (Docket Entry

No. 237; Rec. Vol. 1, p. 89). One of the grounds upon which Meier objected to Jatoi's Plan of Reorganization was that he had failed to include $41,261 in attorneys' fees allegedly incurred to him by Jatoi prior to the filing of Jatoi's bankruptcy as an unsecured claim in his Plan of Reorganization. This was the only material pleading ever filed by Meier raising the issue of his pre-petition attorneys' fees in the amount of $41,261.

On December 19, 1989, a hearing was held on Meier's Objection to Jatoi's Plan of Reorganization. The Bankruptcy Judge sustained Meier's Objection (see Vol. 4 of Record on Appeal).

On January 3, 1990, Jatoi's bankruptcy proceeding was dismissed (Docket Entry No. 250; Rec. Vol 2, p. 177, 181). On January 10, 1990, the Bankruptcy Judge entered what purported to be a Money Judgment against Jatoi for $41,261. (Docket Entry No. 252; Rec. Supp. Vol. 1, p. 192).

On December 16, 1991, (after a remand from the 5th Circuit Court of Appeals on an earlier appeal (P. A-9 of Appendix)) the Bankruptcy Judge entered an Amended Money Judgment against Jatoi in the amount of $41,261 (Rec. Vol. 1, p.16).

Although Meier had filed a claim in Jatoi's bankruptcy it is unclear whether or not that claim encompassed his pre-petition attorneys' fees. Jatoi had filed an Objection to Meier's claim (Docket Entry No. 239) but in such objection no demand for relief was made of a kind specified in Rule 7001 so as to constitute such objection an adversary proceeding (see Rule 3007 Bankruptcy Rules; Colliers Vol. 9, Par. 7001.03 at p. 7001-6). At the time the Bankruptcy Judge entered a Money Judgment against Jatoi there were simply no pleadings on file in the bankruptcy proceeding which in any way would have put Jatoi on notice that Meier was seeking a money judgment against him.

Rule 7001 of the Bankruptcy Rules defines an adversary proceeding as a proceeding (i) to recover money or property . . . (ii) to determine the validity, priority, or extent of a lien or other interest in property . . . (iii) to obtain approval pursuant to Sec. 363(h) for the sale of both the interest of the estate and a co-owner in property, (iv) to object to or revoke a discharge, (v) to revoke an Order of Confirmation of a Chapter 11, Chapter 12, or Chapter 13 Plan, (vi) to determine the dischargeability of a debt, (vii) to obtain an injunction or other equitable relief, (viii) to subordinate any allowed claim or interest . . . , (ix) to obtain a declaratory judgment related to any of the foregoing, (x) to determine a claim or cause of action removed pursuant to 28 USC Sec. 1452.

It is clear that the claim which forms the basis for the judgment of $41,261 in favor of Meier against Jatoi, is a claim for attorneys' fees incurred for pre-petition

work. (See par. 4 of Objection to Disclosure Statement at Rec. Vol. 2, p. 76; par. 7 of Response of William C. Meier to Objection to Claim of William C. Meier (Rec. Vol. 2, p. 170 and 171); and par. 4 of Objection to Jatoi's Plan of Reorganization (Rec. Vol. 2, pp. 90, 91).

To the extent that Meier's claim against Jatoi for attorneys' fees incurred prior to the filing of the petition constitutes a claim to recover money or property, then such claim for recovery must be brought in the form of an adversary proceeding. (See Bankruptcy Rule 7001(i); In Re: Penney, 76 BR 160 (USBC, Ca. 1947); and In Re Zodiac Enterprises, Inc., 84 BR 874 (USBC So. Dist. Florida, 1988).

In In Re: Penney, supra, a fact situation similar to the fact situation here existed. There Plaintiff, Sears Roebuck, sold the debtors certain merchandise retaining a purchase money security interest. The debtors later defaulted in their payments and when Sears demanded the collateral back, the

debtors told Sears they no longer had the items. The debtors then filed a Chapter 7 Petition, and Sears filed an action for recovery of the property, and, in the alternative, for a money judgment ("an Adversary Proceeding") in the Bankruptcy Case. Sears did not first seek to lift the automatic stay. Sears also sought contractual attorneys' fees. There the court said:

"This action is exactly the same action Sears would file in State Court had there been no bankruptcy. For some reason, Sears believes that a debtor can still be sued on a state law cause of action after bankruptcy so long as the suit is filed in the bankruptcy court. This is shear nonsense."

"Rule 7001 is not, as Sears mistakenly believes, an open invitation to commence any sort of adversary proceeding against the debtor. Rather, it merely specifies what sort of relief properly sought under the Bankruptcy Code must (emphasis supplied) be obtained by formal adversary proceeding as opposed to less formal motion or contested matter pursuant to Rule 9014. Rule 7001 is not an invitation to sue a debtor on a cause of action which, if brought in state court, would be a blatant violation of the automatic stay. To say that if money or property is sought it must be by adversary proceeding, is not the same as granting leave to seek money or property for any reason, as Sears interprets the rule."

Meier's claim is clearly an action to recover money from Jatoi and must have been brought as an adversary proceeding with all of the procedural requirements and protections afforded a defendant in any federal court lawsuit. One only has to look at the scope of the rules following Rule 7001 to clearly see the procedural and due process protections which are provided a debtor in such a proceeding.

In fact, nowhere in any of the pleadings which were filed either by Jatoi or Meier in the bankruptcy is any relief sought in the form of a money judgment against Jatoi in favor of Meier as a creditor. With respect to Meier, all of his motions were in the form of an objection to Jatoi's Disclosure Statement and Plan of Reorganization.

An objection to a claim joined with a demand for relief of a kind specified in Rule 7001 may constitute an adversary proceeding. (See Rule 3007 Bankruptcy Rules; Collier's Vol. 9, par. 7001.03 at page 7001-6).

However, although Jatoi objected to Meier's claim, Jatoi neither filed a counterclaim or sought any relief in his objection of the kind specified in Bankruptcy Rule 7001. Accordingly, Jatoi's Objection to Meier's claim could not have possibly constituted an adversary proceeding.

All of the action taken by the Bankruptcy Judge in granting a money judgment against Jatoi occurred after the dismissal of the bankruptcy case on January 3, 1990 (Rec. Vol. 2, pp. 177 and 181). First, the bankruptcy judge's entry of the order with respect to attorneys' fees in favor of Meier on January 10, 1990 (Rec. Supp. Vol. 1, p. 192) and the Order of December 16, 1991, purporting to grant Meier a money judgment against Jatoi in the amount of $41,261 occurred after the bankruptcy case was dismissed, and in the case of the latter order, approximately twenty three and 1/2 months after the bankruptcy case was dismissed. It is Jatoi's contention that

the bankruptcy judge lacked jurisdiction to enter the orders.

In the case of Matter of Solar Equipment Corp., I.D., 19 BR 1010 (USDC W.D. La. 1982) the District Court held following dismissal of a bankruptcy case, the bankruptcy court lacked subject matter jurisdiction to determine the federal tax liability of a debtor. The court went on to state:

"Once a case is dismissed, there is no longer a bankruptcy estate. Concomitantly, there is no authority (or reason) for a bankruptcy court to continue the determination of a debtor's tax liability. In Gardens of Cortez v. John Hancock Mutual Life Insurance Co., 585 F.2d 975 (10th Cir. 1978) the court considered whether the bankruptcy court had jurisdiction to consider the debtor's counterclaim after the dismissal of the debtor's petition. As the Tenth Circuit held . . . having dismissed the petition, the bankruptcy court lost jurisdiction to proceed further with Cortez' counterclaim. In the case at bar, as in Gardens of Cortez, the bankruptcy court having dismissed the debtor's petition, has no jurisdiction to proceed to determine debtor's tax liability."

Section 349 of the United States Bankruptcy Code (11 USC Sec. 349) specifically provides for the effect of a dismissal. Subsection (b) thereof provides that unless

the bankruptcy court for cause orders otherwise, a dismissal of a case revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

In Gardens of Cortez, supra, the creditor filed a Motion to Lift the Stay in order to seek to proceed with a foreclosure action against the debtor. The debtor answered the creditor's stay complaint and counterclaimed against the creditor for alleged tortious interference. Prior to a hearing on the creditors request to lift the stay and the debtor's counterclaim the bankruptcy case was dismissed. The Court there held:

"Having determined that the Bankruptcy Court did not err in dismissing the petition, the other matters raised in this court by Cortez are in our view rendered moot. Certainly Hancock's request that the stay order be lifted became moot when the bankruptcy judge dismissed the petition. And by the same token, having dismissed the petition, the Bankruptcy Court lost jurisdiction to proceed further with Cortez' counterclaim." (Emphasis supplied)

In construing Sec. 349 of the United States Bankruptcy Code (11 USC Sec. 349) the

United States Court of Appeals for the Ninth Circuit, in the matter of In Re: Income Property Builders, Inc., 699 F.2d 963 (9th Cir. 1982) stated as follows:

"11 USC Sec. 349, treating the effects of a bankruptcy, obviously contemplates that on dismissal a bankrupt is reinvested with the estate, subject to all encumbrances which existed prior to the bankruptcy. After an order of dismissal, the debtor's debts and property are subject to the general laws unaffected by bankruptcy concepts. . ."

The only instances of which Jatoi is aware in which a bankruptcy court continues to have some jurisdiction after a dismissal, are those cases under Sec. 349(b) of the Bankruptcy Code (11 USC Sec. 349(b)) where a court specifically retains jurisdiction over certain funds for cause under Sec. 349(b)(3). See In Re: Gonic Realty Trust, 909 F.2d 624 (1st Cir., 1990); and In Re: Miranne, 87 BR 897 (E. D. La., 1988).

The only other instance in which a bankruptcy court can retain some jurisdiction following dismissal of a case is the inherent power of a bankruptcy court to construe its

own orders. See In Re: Herman J. Franklin, 802 F.2d 324 (9th Cir., 1986).

In this case the Bankruptcy Court's Orders of January 10, 1990, and December 16, 1991, neither involved retention of jurisdiction over funds or property of the estate pursuant to 11 USC Sec. 349(b)(3) or construction of the Bankruptcy Court's previous orders. Accordingly, it is Jatoi's contention that the Bankruptcy Court lacked jurisdiction to have entered said orders and, accordingly, such orders are void.

II. THE COURT OF APPEALS AFFIRMING OF THE DISMISSAL OF AN APPEAL FROM A BANKRUPTCY COURT ORDER BY THE DISTRICT COURT FIVE DAYS AFTER APPELLANT'S BRIEF WAS DUE WITHOUT ANY PRIOR NOTICE AND WHEN NO NOTICE OF DOCKETING OF THE APPEAL HAD BEEN SENT PURSUANT TO RULE 8007 OF THE BANKRUPTCY RULES IS IN CONFLICT WITH OTHER DECISIONS OF THE 5TH CIRCUIT COURT OF APPEALS AND OTHER FEDERAL COURT OF APPEALS ON THE SAME MATTER AND CONSTITUTES SUCH AN ABUSE OF DISCRETION AS TO BE A FUNDAMENTAL DENIAL OF DUE PROCESS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The standard of review of an Order dismissing an appeal for failure to file

Appellant's Brief is whether the lower court abused its discretion in dismissing the appeal. Pyramid Mobile Homes, Inc. v. Speake, 531 F.2d 743 (5th Cir. 1976); Ispass v. Pyramid Motor Freight Corp., 333 U.S. 695, 68 S. Ct. 954, 91 L. Ed. 1184.

Jatoi's failure to timely file a brief in the District Court was not the result of contumacious conduct by Jatoi, or conscious indifference to the Rules of Procedure of the United States District Court or Rules of Appellate Procedure. If Jatoi or his counsel had received notice of the date the appeal was docketed, his brief would have been timely filed. His failure to receive notice of the docketing of the appeal was through no fault of his own. Jatoi contends that dismissal of his appeal under the facts present in this record was an abuse of discretion, and the appeal should be reinstated..

In the case of Pyramid Mobile Homes, Inc. v. Speake, supra, the Court held that pursuant to Federal Rules of Appellant Procedure, Rule

3(a), dismissal is discretionary and should be considered in light of the prejudicial effect of delay on the Appellee and the bona fides of the Appellant.

Rule 3 clearly contemplates that late filing of an appellant's brief can be allowed inasmuch as it provides:

"Failure of an Appellant to take any step other than the timely filing of a Notice of Appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal."

Thus, it can clearly be seen that failure to timely file a brief does not require dismissal of the appeal. Whether a dilatory appellant should be allowed to proceed with his appeal is within the discretion of the appellate court. Ispass v. Pyramid Motor Freight Corp., supra. Whether or not an Appellate Court has abused its discretion in dismissing an appeal for failure to timely file an appellant's brief should be determined upon the facts of each case, giving due consideration to the prejudicial effect of

delay on the appellee and the bona fides of the appellant. Dawson v. Williams, 146 F.2d 38 (5th Cir. 1944).

Jatoi recognizes, in light of Pyramid Mobile Homes v. Speaks, supra, that especially in bankruptcy cases, prompt resolution of the appeal process should be sought; however, no prejudicial effect directly impacts on the bankruptcy aspects of this case, or upon the creditors of Jatoi, as the Debtor. Jatoi's bankruptcy case was dismissed on January 3, 1990, (Rec. Vol.2 , pp. 177 and 181).

The judgment from which this appeal was taken was entered December 16, 1991, approximately one year eleven months after the dismissal of the bankruptcy. There can be no prejudicial effect upon Meier in reinstating the appeal. The judgment has been fully secured by a bond for stay of execution of judgment pending appeal, which is secured by certificates of deposit in the principal sums of $22,629.36 and $34,000.00, respectively (Rec. Supp. Vol. 1, p. 196).

Further, the bona fides of Jatoi, as reflected by the issues raised in this petition dictates that this appeal be reinstated.

There is no evidence of any dilatory tactics undertaken by Jatoi in the case before the Bankruptcy Court or District Court or upon appeal, or of contumacious conduct or conscious disregard of the Federal Rules of Civil Procedure or Federal Rules of Appellate Procedure. In fact, the record demonstrates that good cause exists for the failure of Jatoi to have filed his Appellant's Brief within fifteen (15) days of docketing the appeal inasmuch as the record reflects that no Notice of Docketing that Appeal was sent by the District Clerk in compliance with Rule 8007 of the Bankruptcy Rules. Further, the case was dismissed by five (5) days after Jatoi's brief was due without any correspondence or notification to Jatoi.

The Bankruptcy Rules are designed to assure due process and an orderly procedure in

the handling of bankruptcy matters, as well as certainty in the timing and filing of bankruptcy related papers. The time for filing appellant's brief in the appeal of a bankruptcy order to the district court runs from the "docketing" of the appeal (Bankruptcy Rule 8009(a)(1)). Bankruptcy Rule 8007(b) requires the clerk of the District Court to give notice to all parties of the date on which the appeal was docketed.

The facts of this case are easily distinguished from the facts of International Brotherhood of Teamsters v. Braniff Airways, Inc., (In re Braniff Airways, Inc.) 774 F.2d 1303 (5th Cir. 1985) cited by the District Court as support for its Memorandum and Order dismissing Jatoi's appeal (P. A-7 of Appendix), and by the Court of Appeals in affirming such dismissal (P. A-1 of Appendix). In that case the appellant's brief had not been filed 19 1/2 months after it was due. Further, the appeal was dismissed "because no explanation had been given for appellant's

failure either to file a brief or to monitor the case." Id. p. 1304. However, this court noted in that case that, although there was no issue concerning the good faith of appellant or its counsel, "the delay in considering the appeal might well be prejudicial to the appellee and others." Id. 1304. In the case now before this Court, the District Court dismissed the appeal when the Appellant's Brief was not filed only 5 days after it was initially due. (Note: This does not involve a situation where an extension had been sought and granted, and then the brief wasn't timely filed.) The Appellant has good cause for not filing the brief because notice of docketing the appeal was not sent to him or his counsel. Lastly, neither Appellee nor others is prejudiced. The Appellant's bankruptcy had been dismissed before the judgment at issue, thus no other interested parties exist. The judgment is secured by the above referenced bond.

The opinion of the Court of Appeals in this case (p. A-1 of Appendix) clearly ignores guidelines which the Court of Appeals had set for reviewing dismissals of appeals for failing to timely file an Apellant's Brief In Pyramid Mobil Homes, Inc. v. Speak, supra, the Court of Appeals set forth the following guideline:

> Pursuant to Federal Rules of Appellate Procedure, Rule 3(a), dismissal is discretionary and should be considered in light of the prejudicial effect of delay on the appellee and the bona fides of the appellant.

This standard was clearly considered in International Board of Teamsters v. Braniff Airways, supra, wherein the Court said:

> Although there was no issue concerning the good faith of appellate or its counsel, "the delay in considering the appeal might well be prejudicial to the appellees and others" Id. 1304.

Clearly, in the International Brotherhood of Teamsters case, the prejudicial nature of the delay, in accordance with the guidelines set forth by Pyramid Mobil Homes, Inc. v. Speak, supra, was instrumental in the decision.

Such decision is also in comflict with the decisions of other circuits. See Gunther v. E. I. DuPont De Nemours & Company, 255 F.2d 710 (U.S.C.S. 4th Cir., 1958); Stumpf v. Matthews, 195 F.2d 25 (U.S. App. D.C. 1951); Miller v. U. S., 117 F.2d 256 (U.S.Ct. 7th Cir. 1941).

Further, the Court of Appeals has clearly misconstrued the import of Federal Rule of Bankruptcy Procedure 8007(b) and 8009(a)(1). Federal Rule of Bankruptcy Procedure 8009(a)(1) clearly provides that the appellant's brief is due 15 days after the entry of the appeal on the docket. Federal Rule of Bankruptcy Procedure 8007(b) provides the mechanisms by whch litigants are apprised of the date upon which the appeal is entered on the docket. The language of Rule 8007(b) is mandatory and provides:

> The clerk of the district court or the clerk of the bankruptcy appellate panel shall (emphasis supplied) enter the appeal in the docket and give notice promptly to all parties to the judgment, order or decree appealed from of the date on which the appeal was docketed.

Jatoi has never contended that the date upon which the Appellant's brief is due runs from the date of the notice provided by the District Clerk. Jatoi's contention has always been and is simply that he was never given notice of the date upon which the appeal was entered on the docket, and therefore he had no means to know the date from which the 15 days begins to run in which he must file his Appellant's Brief, such date being the date of entry of the appeal on the docket, in this case, July 7, 1992.

Although it is true that the District Judge in a response to an agreed motion between Jatoi and Meier to reinstate the appeal entered an order to the effect that he was inclined to grant such agreed motion, but inasmuch as the case had been appealed to the Court of Appeals he had no jurisdiction to do so until such time as action was taken to remand the matter to his court. Jatoi knows of no method by which the case could have been remanded to the District Court except through

his appeal to the Court of Appeals. In fact, one of the remedies which Jatoi sought specificaly before the Court of Appeals as is reflected in the conclusion of his Appellant's Brief to the Court of Appeals was in fact that the case be remanded to the District Court for a decision on the merits. There is simply no evidence before the Court that Jatoi failed to monitor his appeal. The undisputed evidence is that the District Clerk never prepared and sent a notice of the date of docketing of the appeal to all parties in interest as required by Bankruptcy Rule 8007(b).

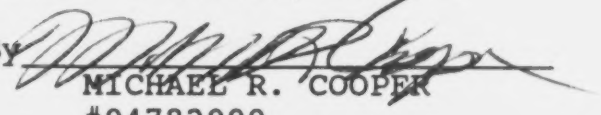
Accordingly, in view of the legitimate issues Appellant can raise in his appeal as are reflected by the other issues raised herein, the District Court clearly abused its discretion by dismissing the appeal.

CONCLUSION

Thus, and for all the foregoing reasons, the Court should grant the Writ of Certiorari and set the case down for briefing and argument on the issues herein presented.

Respectfully submitted,

DOOLEY & RUCKER, P.C.

By 

MICHAEL R. COOPER
#04782000

3300 Oak Lawn, Suite 602
Dallas, TX 75219
(214) 443-0309

Attorneys for Jatoi

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALIMADAD JATOI,
Petitioner,

v.

WILLIAM C. MEIER,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

APPENDIX

MICHAEL R. COOPER
MARSHAL W. DOOLEY

DOOLEY & RUCKER, P.C.

3300 Oak Lawn, Suite 602
Dallas, Texas 75219
(214) 443-0000
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1750
Summary Calendar

IN THE MATTER OF: ALIMADAD JATOI

Debtor.

ALIMADAD JATOI,

Appellant,

VERSUS

WILLIAM C. MEIER,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CV-488-A)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

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1 Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Alimadad Jatoi appeals the district court's summary dismissal of his appeal from a bankruptcy court order. We AFFIRM.

I.

In August 1987, Jatoi filed a voluntary petition under Chapter 11 of the Bankruptcy Code. William C. Meier was apparently representing Jatoi in ongoing litigation, and the bankruptcy court authorized Jatoi to employ Meier under a general retainer as "special litigation counsel." In the fall of 1989, Meier objected to Jatoi's disclosure statement and reorganization plan, asserting that $14,962.07 in attorney's fees and expenses for services rendered to Jatoi post-petition and previously approved by the bankruptcy court should be listed as an administrative expense. He also contended that fees and expenses of $41,261.00[2] were incurred pre-petition and should be listed as a secured claim.[3] Jatoi objected to

2 Meier's October 27, 1989, Objection to Disclosure Statement lists this amount at $41,271.00, but the subsequent Objection to Debtor's Plan of Reorganization as well as the court's order, list it at $41,261.00.

Meier's claims, and moved to have Meier disgorge some $63,000.00 in previously paid fees. No ruling was rendered on any of these claims, and Jatoi's bankruptcy was dismissed pursuant to an agreed order on January 3, 1990.

On January 10, 1990, the bankruptcy court entered findings of fact, conclusions of law, and a *nunc pro tunc* order denying Jatoi's motion to disgorge, effective as of December 19, 1989. On November 12, 1991, the bankruptcy court entered a separate judgment denying the disgorgement motion.[4] On December 16, it ordered, also *nunc pro tunc*, that Meier recover the $41,261.00 in pre-petition fees and that the $14,962.07 in post-petition fees were "due and payable".

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3 In his Objection to Disclosure Statement, filed on October 27, 1989, Meier suggested that this amount should be listed as a Class 20 unsecured claim. However, on November 30, in his Objection to Debtor's Plan of Reorganization, he amended his position and stated that it should be a Class 20 secured claim because Jatoi had been notified that Meier was assorting an attorney's lien against all of Jatoi's books, records and papers in his possession.

[4] The explanation for this belated separate judgment is tied to another *nunc pro tunc* order which is not in the record before us. When the January 10 order denying the motion to disgorge was entered, apparently a second *nunc pro tunc* order was entered on the matter of Meier's fees. A reference to such an order appears on the bankruptcy court docket sheets, but, as stated, no such order is in the record before us. It seems that Jatoi appealed this second order, and the district court dismissed for lack of jurisdiction because the notice of appeal was not timely filed. A timely notice of appeal to this court was filed; we remanded for entry of a separate judgment pursuant to Fed. R. Bankr. P. 9021. The district court apparently referred the matter to the bankruptcy court and thus, the second set of *nunc pro tunc* orders was entered, one in November 1991 and one in December 1991, discussed *infra*.

Jatoi filed a timely notice of appeal from the December 16 order. It was not docketed, however, until July 7, 1992, from which time the bankruptcy rules allow the appellant 15 days to file a brief. Fed. R. Bankr. P. 8009(a)(1). Receiving no brief from Jatoi by July 27 (five days after it was due), the district court *sua sponte* dismissed the appeal.[5] Jatoi took the instant appeal on August 26, but on September 29, he and Meier filed an agreed motion for reinstatement of

the appeal in the district court. That motion has since been denied.[6]

II.

We review the district court's dismissal for clear abuse of discretion, *Pyramid Mobile Homes, Inc. v. Spoake*, 531 F.2d 743 (5th Cir. 1976), and find none.

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5 Fed. R. Bankr. P. 8001(a) allows, but does not mandate, such dismissal.

6 Initially, by order on November 16, 1992, the district court held the agreed motion in abeyance, suggesting in its order that, despite its inclination to the contrary, it would grant the motion if only to allow Meier to have the matter decided on its merits. However, the court pointed out that it lacked jurisdiction because an appeal to this court had already been taken, and implied that the appellant should take "some action . . . to cause the action to be remanded to this court or to cause the appeal to be reinstated".

Jatoi did not withdraw his appeal to this court, nor did he file a motion to remand to the district court. On December 9, the district court entered a minute order stating that if no action was taken within 30 days, the motion to reinstate would be denied. Apparently no action was taken, and the agreed motion was denied on January 13, 1993.

Jatoi correctly notes that the 15 day period for filing appellate briefs in bankruptcy actions runs from the date the appeal is docketed, and, contends that, because he never received such notice, he

could not have known when his 15 days began to run. However, under Jatoi's reasoning, we would be required to find to find that a district court abuses its discretion in all cases if it does not make an express finding regarding the appellant's receipt of notice. Although Federal Rule of Bankruptcy Procedure 8007(b) states that the district court clerk "shall enter the appeal in the docket and give notice promptly to all parties . . . of the date on which the appeal was docketed", Rule 8009(a)(1) does not provide that the 15 days for filing appellant's brief runs from the date of notice of the entry. Rather, the period runs from "entry of the appeal on the docket". Fed. R. Bankr. P. 8009(a)(1). And, if an appellant fails to take certain steps in the prosecution of the appeal, Rule 8001(a) grants the district court discretion to take "such action as [it] deems appropriate, which may include dismissal of the appeal". We do not read these rules to require the district court to make an express finding, in every

case, of receipt of notice of docketing before an appeal can be dismissed.

In *International Bhd. of Teamsters v. Braniff Airways*, 774 F.2d 1303 (5th Cir. 1985), we affirmed such a dismissal in the absence of an express finding regarding notice. There, the appellant had not filed his brief 19 1/2 months after filing his notice of appeal. The district court dismissed because "no explanation had been given for appellant's failure either to file a brief or to monitor the case". *Id.* at 1304. Here, Jatoi contends that he received no notice of docket entry, but offers no explanation for his failure to monitor his case. Seven months passed between the filing of his notice of appeal and dismissal. The record does not reflect any effort to contact the court or determine the status of his appeal.

The district court relied on *Braniff* in its dismissal order. In its subsequent order, holding the agreed motion to reinstate in abeyance,[7] see *supra* note 6, it is clear

that the district judge was quite familiar with this case. Given the facts of this case, and the district court's familiarity with them, we cannot say that the dismissal was a clear abuse of discretion. As stated in *Braniff*, "[p]atently the issue is not what this panel might have done if we were the district court, but whether, having set a standard granting district courts discretion, we should deny in action what we have announced as precept." *Id.* at 1305.

III.

Accordingly, the judgment is

AFFIRMED.

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7 We note that this order gave Jatoi the opportunity to gain the precise relief he seeks here. Had he but followed the district court's initial, and subsequent, suggestion, his appeal to the district court might well have been reinstated.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
ALIMADAD JATOI,	§	
	§	
Debtor	§	
	§	
	§	
ALIMADAD JATOI,	§	
	§	
Appellant,	§	
	§	
VS.	§	NO. 4:92-CV-488-A
	§	
WILLIAM C. MEIER,	§	
	§	
Appellee.	§	

MEMORANDUM OPINION
AND
ORDER

Came on for consideration the above-styled and numbered action. This appeal was docketed in this court on July 7, 1992. Appellant's brief on appeal was due fifteen days thereafter. Bankr. R. 8009. The record on appeal reflects that appellant has failed to file his brief as required. Accordingly, the court finds that the above-styled and numbered action should be dismissed.

International Brotherhood of Teamsters v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 774 F.2d 1303, 1305 (5th Cir. 1985). Therefore,

The court ORDERS that the above-styled and numbered action be, and is hereby, dismissed.

SIGNED July 27, 1992.

s/John McBryde
JOHN McBRYDE
United States District Judge

FOR THE FIFTH CIRCUIT

No. 91-1524

Summary Calendar

IN THE MATTER OF: ALIMADAD JATOI, Debtor.

ALIMADAD JATOI,

Appellant,

versus

WILLIAM C. MEIER,

Appellee.

Appeal From the United States District Court
for the Northern District of Texas
(CA4-90-266-A)

(September 26, 1991)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE,

Circuit Judges.

PER CURIAM:[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

"EXHIBIT A"

In this case we deal with the scope of Bankruptcy Rule 9021(a) which incorporates F.R. Civ. P. 58 requiring that all judgments in adversary proceedings be set forth on a separate document. Appellant Alimadad Jatoi was the debtor in a bankruptcy proceeding in the Northern District of Texas. Appellee William C. Meier had been Jatoi's attorney and filed a claim for fees in the bankruptcy proceeding.

The bankruptcy court granted the attorneys' fee claim in an order which was signed and entered on the docket on January 10, 1990. On February 6, 1990, Jatoi's attorney filed a notice of appeal from this order, along with an affidavit attempting to justify what he believed to be an untimely filing. The district court denied the appeal for lack of jurisdiction on the basis of the untimely filing. Jatoi timely filed a notice of appeal from that denial.

Jatoi has now moved in this court to dismiss his appeal and remand the case to the district court because the bankruptcy court

has never entered a separate judgment as required by Rule 9021(a). We find that the bankruptcy court's order did not constitute a separate judgment and that Jatoi has not waived his right to a separate judgment. Therefore we grant his motion to remand to the district court.

I.

The first question we must resolve is whether the bankruptcy court's order constituted a separate judgment as required by Bankruptcy Rule 9021(a). Although the order contained language which resembles that used in a judgment ("it is accordingly ordered, adjudged, and decreed"), it also contains findings of fact and other materials supporting the court's decision. Documents which contain such additional reasoning and findings are not separate judgments. In the Matter of Seiscom Delta, 857 F.2d 279, 280 (5th Cir. 1988). Therefore, the bankruptcy court's order did not constitute a separate judgment.

II.

The second issue we must address is whether Jatoi has waived his right to demand a separate judgment by pursuing his appeal to this point. In approaching the waiver issue, we bear in mind the Supreme Court's observation that the separate judgment rule "is not designed as a trap for the inexperienced" and "should be interpreted to prevent loss of the right of appeal, not to facilitate loss." Mallis v. F.D.I.C., 435 U.S. 381, 386 (1978).

We consider three factors in determining whether the separate judgment requirement has been waived: (1) whether the lower court "clearly evidenced its intent that the opinion and order would represent the final decision in the case"; (2) that "a judgment was recorded in the clerk's docket"; and (3) most importantly, that petitioner "did not object to the taking of the appeal in the absence of a separate judgment." In the matter of Seiscom Delta, Inc., 857 F.2d 279, 282 (5th Cir. 1988).

Since the first two factors are clearly present in this case, we focus on the failure of petitioner to object. We are persuaded by similar cases in other circuits which have held that filing an appeal based upon the adverse judgment does not constitute a waiver of the separate document requirement particularly where the right to appeal on the merits would be lost. In re Ozark Restaurant Equipment, Co., 761 F.2d 481, 483 (8th Cir. 1985). See also, Parisie v. Greer, 705 F.2d 882, 891 (7th Cir. 1983) (en banc); Gregson & Associates Architects v. Government of the Virgin Islands, 675 F.2d 589, 593 (3d Cir. 1982). To hold otherwise would undermine the very purpose of the rule which is to protect appellants in Jatoi's position by providing certainty in the timing of appeals. We are therefore unwilling to hold that an appellant waives his right to a separate judgment by not asserting it before appealing the order itself. Because no separate judgment was entered in this case, Jatoi's appeal could not have been time-barred.

Accordingly, we deny the motion of appellant to dismiss this appeal but grant the appellant's alternative motion to remand this case to the District Court for an initial decision on the merits. We also, for the reasons set out above, deny the motion of the appellee to dismiss the appeal for lack of jurisdiction. In addition, we deny the motion to supplement the record on appeal which is no longer necessary.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute

§ 349. **Effect of dismissal**

(a) Unless the court for cause, orders, otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(f) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title --

(1) reinstates --

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the

commencement of the case under this title.

Rules

3007 - Objections to Claims

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing hereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

7001 - Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 443(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d),(3) to obtain approval pursuant to 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.

8007 Completion and Transmission of the Record; docketing of the appeal

(b) **Duty of Clerk to Transmit Copy of Record; Docketing of Appeal**

When the record is complete for purposes of appeal, the clerk shall transmit a copy thereof forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel. On receipt of the transmission the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter the appeal in the docket, and give notice promptly to all parties to the judgment, order, or decree appealed from of the date on which the appeal was docketed. If the bankruptcy appellate panel directs that additional copies of the record be furnished, the clerk of the bankruptcy appellate panel shall notify the appellant and, if the appellant fails to provide the copies the clerk shall prepare the copies at the expense of the appellant.

8009 - Briefs and Appendix; Filing and Service

(a) **Briefs.** Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.